Supreme Court, U.S.
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No. 10-171

IN THE

Supreme Court of the United States

LAURA GONZÁLEZ-VERA, *ET AL.*,
PETITIONERS,

v.

MICHAEL VERNON TOWNLEY, *ET AL.*,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under a proper interpretation of 18 U.S.C § 3523, the Attorney General has unreviewable power to deprive a judgment creditor of a meaningful judicial procedure to collect a tort judgment from a debtor who is in the federal Witness Protection Program, thus circumventing the Federal Rules of Civil Procedures and overriding the laws of all states and territories that are expressly incorporated into the Federal Rules.

PARTIES TO THE PROCEEDING

The parties to the U.S. Court of Appeals proceeding were plaintiffs-appellants Laura González-Vera and Ali A. Beydoun, as personal representative of the estate of Carmelo Soria Espinoza; and defendants-appellees Michael Vernon Townley, Eric Holder, as Attorney General of the United States, and the United States of America.

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STATEMENT OF JURISDICTION

On February 23, 2010, the court of appeals affirmed the district court judgment. On May 4, 2010, the court of appeals denied Petitioners' timely petition for rehearing and rehearing *en banc*. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (2009).

STATUTORY PROVISIONS INVOLVED

The United States Marshal Service and Witness Security Reform Act of 1984, 18 U.S.C. § 3523(b)(1) (1984) provides:

> Any person who holds a judgment entered by a Federal or State court in his or her favor against a person provided protection under this chapter [18 U.S.C. §§ 3521 et seq.] may, upon a decision by the Attorney General to deny disclosure of the current identity and location of such protected person, bring an action against the protected person in the United States district court in the district where the person holding the

> judgment (hereinafter in this subsection referred to as the 'petitioner') resides.

STATEMENT OF THE CASE

This case concerns the victims of federal Witness Security Program (WSP) participants. The facts presented typify the complications that arise when victims seek to enforce valid judgments against WSP participants. Congress codified the United States Marshal Service and Witness Security Reform Act of 1984 (Reform Act) to alleviate the very problems Petitioners now face.

Michael Vernon Townley is a WSP participant, living under the protection of the U.S. government despite his status as a confessed terrorist, torturer, and assassin. Family members of Mr. Townley's victims, such as Ms. González-Vera, are unable to enforce valid judgments held against Mr. Townley. The Attorney General's unauthorized expansion of delegated authority precludes judicial oversight over Mr. Townley's ability to pay. Petitioners seek a sensible interpretation of 18 U.S.C. § 3523 to ensure compliance with the evident congressional purpose. The courts below failed to heed the statutory command to provide judicial enforcement assistance.

I. Statutory Background

The WSP developed under the Organized Crime Control Act of 1970 to protect government

witnesses who testified against dangerous criminals. Prior to the program's inception, witnesses and their families were frequently threatened, abused, or killed to prevent witnesses' testimony. WSP gives participants new identities and locations to protect them from threats and harm.[1] Despite admirable goals, however, WSP has limited innocent third parties' enforcement of judgments held against protected debtors.

Prior to the Reform Act, third parties struggled to enforce custody agreements or civil judgments against protected debtors. U.S Gen. Accounting Office Report, *Changes Needed in Witness Security Program, Report by the Comptroller General of the United States* 26 (1983) [hereinafter GAO Report]; DOJ Report of the WSP Review Committee 7 (1978) [hereinafter DOJ Report]. Third parties could only enforce judgments if the Attorney General disclosed the identity and location of protected debtors. The Attorney General was not required, however, to assist judgment holders. GAO Report at 23–24.

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[1] To date, WSP has successfully protected more than 8,000 witnesses and nearly 10,000 of their relatives. *See* U.S. Marshal Service, Witness Security Program, http://www.usmarshals.gov/witsec/ (last visited July 25, 2010). WSP operates on more than a $50 million budget. *See Committee Findings (Witness Security Program): Hearing on The Effectiveness of the Department of Justice Witness Security Program*, 104th Cong. 6, 58–59 (1996) [hereinafter *1996 Hearings*]. The Witness Security and Protection Grant Program Act of 2010 projects an additional $150 million in expenses. *See* H.R. 171, 11th Cong. (2009).

Vesting such unreviewable discretion in the Attorney General proved problematic. The Attorney General's "nondisclosure practice adversely affected third parties and put the Department—the Nation's chief law enforcement agency—in the ironic position of being a barrier to law enforcement." GAO Report at iii. The Attorney General prioritized the protection of participants over that of third parties, leaving third parties vulnerable to "the unscrupulous actions of witnesses." GAO Report at 14. The Attorney General's duty to protect witnesses created conflicting executive roles and raised serious concerns of objectivity. GAO Report at 28–29. WSP's function as a haven for criminals to avoid legal obligations called for legislative intervention. DOJ Report at 339; GAO Report at 23.[2]

In 1984, after comprehensive hearings, Congress enacted the United States Marshal Service and Witness Security Reform Act. In doing so, Congress requires that WSP participants contractually promise to both uphold civil obligations

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[2] WSP has also been criticized for enabling participants' continued criminal behavior. *See, e.g., Bergmann v. United States*, 689 F.2d 789 (8th Cir. 1982) (involving a WSP participant's murder of a police officer). Because nearly all WSP participants were previously steeped in criminal activity, their criminality often recurs after relocation. *See 1996 Hearings, supra* note 1, at 6–7. Federal courts still confront this issue. *See, e.g., Lawrence v. United States*, 340 F.3d 952 (9th Cir. 2003) (concerning a participant's systematic sexual abuse of a juvenile at his place of employment); *Taitt v. United States*, 770 F.2d 890 (10th Cir. 1985) (regarding a participant's murder of a college student).

and refrain from criminal acts. *See* 18 U.S.C. § 3521. Yet given the typical signatory's character, a mere agreement to obey the law necessitated an enforcement scheme. Accordingly, Congress designed § 3523 to achieve four objectives: (1) maintain a balance between protected debtors' security and judgment holders' justice,[3] (2) ensure enforcement through disclosure of protected debtors' information in certain circumstances,[4] (3) provide a limited role for the Attorney General to assist, rather than bear the sole responsibility for, enforcement,[5] and (4) facilitate judgment holders' access to the judiciary.[6] *See* H.R. Rep. 98-767, at 22 (1984) ("Admission of a person into the Program is not to be used by the protected person to avoid outstanding legal obligations. This section secures that result.").

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[3] "This section also creates a mechanism which will facilitate enforcement of judgments without unnecessarily jeopardizing the security of the program." H.R. Rep. No. 98-767, at 13 (1984).

[4] While § 3523(a) allows the Attorney General to disclose the protected debtor's information directly to the judgment holder, § 3523(b) provides disclosure to the guardian: "This type of disclosure—to the guardian as an officer of the court—will allow access to a sufficient amount of information to secure enforcement of the judgment." *Id.* at 23.

[5] "This section also avoids any potential government liability to creditors by facilitating direct collection from the debtor." *Id.* at 22.

[6] "This section is designed to provide persons with legitimate economic and other grievances against protected witnesses with redress through the Federal courts." *Id.* at 22.

Section 3523 provides separate administrative and judicial enforcement assistance. Subsection 3523(a) details the Attorney General's duties:

> If the Attorney General determines that the person has not made reasonable efforts to comply with the judgment, the Attorney General may, after considering the danger to the person and upon the request of the person holding the judgment disclose the identity and location of the person to the plaintiff entitled to recovery pursuant to the judgment....

Subsection 3523(b), on the other hand, enables a judgment holder to petition the court to appoint a guardian to assist enforcement of an outstanding judgment. Subsection 3523(b) allows a judgment holder to bring an action in federal court if the Attorney General denies to disclose the protected debtor's current identity and location. *See* § 3523(b)(1); H.R. Rep. No. 98-767, at 22 (1984) ("Subsection (b)(1) provides a procedure for situations where ...the Attorney General, despite efforts at securing compliance, has *refused* to disclose the name and location of the protected person/debtor.") (emphasis added). Subsection 3523(b) limits the Attorney General's obligations, stating he "shall appear in the action and shall affirm or deny...that the petitioner requested the Attorney General to disclose the identity and location of the protected person for the purpose of

enforcing the judgment." § 3523(b)(2); *see also Hermanson v. Hunter*, No. 07-CV-936-WQH, 2008 WL 2856470, at *4 (S.D. Cal. July 23, 2008) ("The Attorney General is a necessary party to all actions under 18 U.S.C. § 3523(b)(1), as the statute requires that the Attorney General appear in the action and be subject to an order of disclosure if the Court determines it is required.").

The statute requires the court to "appoint a guardian to act on behalf of the petitioner to enforce the judgment" if the court determines both:

> (A) that the petitioner holds a judgment entered by a Federal or State court and (B) that the Attorney General has declined to disclose to the petitioner the current identity and location of the protected person.... The Attorney General shall disclose to the guardian the current identity and location of the protected person and any other information necessary to enable the guardian to carry out his or her duties under this subsection.

§ 3523(b)(3). To maintain a proper balance between the judgment holder's rights and WSP's integrity, the guardian must "maximize[]...the safety and security of the protected person." § 3523(b)(4). Hence, the guardian cannot disclose identifying information "without the permission of the Attorney General, except...to a Federal or State court in order to enforce the judgment." § 3523(b)(4). The

guardian can also "perform any act with respect to the judgment which the petitioner could perform, including the initiation of judicial enforcement actions in any Federal or State court...." § 3523(b)(5). Overall, § 3523 ensures enforcement assistance by codifying solutions to the problems that previously plagued WSP and innocent third parties.

II. Factual Background

Laura González-Vera's outstanding judgment against Michael Vernon Townley illustrates how a misconstruction of § 3523 frustrates Congress' enforcement scheme. Ms. González-Vera's situation is not unique as WSP contains thousands of criminals who have demonstrated an aptitude for evading civil obligations. *See supra* note 2.

Mr. Townley was an agent of Chile's Dirección de Inteligencia Nacional (DINA), the secret intelligence service created by General Augusto Pinochet to suppress political opposition. *United States v. Sampol*, 636 F.2d 621, 629 (D.C. Cir. 1980) (detailing Mr. Townley's crimes under DINA employment). His involvement included the kidnapping, torture, and murder of Mr. Soria, Ms. González-Vera's husband, on July 14, 1976. *Gonzalez-Vera v. Townley*, 595 F.3d 379, 380 (D.C. Cir. 2010). Mr. Townley has additionally committed crimes of falsehood, including identification fraud and money laundering.

Mr. Townley entered WSP in exchange for pleading guilty to conspiracy to kill a foreign official[7] and providing testimony against those he hired. *See Sampol*, 636 F.2d at 629 (describing Mr. Townley's admitted complicity in the deaths of Orlando Letelier, former Chilean Ambassador to the United States, and Ronni Moffitt, an American associate, both killed "by the remote control detonation of a bomb attached to the undercarriage of the automobile in which they were riding"). He served only five-and-one-half years of his ten year jail sentence, and upon his release in 1983, was provided a new identity, legal status, residence, and employment. *See* Declaration of Stephen J. T'Kach at 2, *Gonzalez-Vera v. Townley*, 597 F. Supp. 2d 98 (D.D.C. 2009).

Mr. Townley's murder of Mr. Soria resulted in grave consequences for Mr. Soria's family. Mr. Soria was survived by his wife, Ms. González-Vera, and three children (ages 11, 16, and 18 at the time). Affidavit of Laura Gonzalez-Vera Marchant, *Gonzalez-Vera v. Townley*, 597 F. Supp. 2d 98 (D.D.C. 2009). Following harassment, threats, and attempted kidnappings, Mr. Soria's family left Chile for exile in Spain. *Id.* Due to the traumatic ordeal, Mr. Soria's family is "damaged forever," having suffered from physical and psychological harm. *Id.*

Mr. Townley has admitted his substantial role in the torture and murder of Mr. Soria. *Gonzalez-*

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[7] *See Letelier v. Chile*, 748 F.2d 790, 791–92 (2d Cir. 1984); *Letelier v. Chile*, 502 F. Supp. 259, 259–63 (D.D.C. 1980); *Letelier v. Chile*, 488 F. Supp. 665, 665–67 (D.D.C. 1980).

Vera, 597 F. Supp. at 99. On November 13, 2002, Ms. González-Vera sued Mr. Townley for complicity in torturing and killing her husband. *See Gonzalez-Vera v. Kissinger*, No. 02-2240, 2004 WL 5584378 (D.D.C. Sept. 17, 2004). Mr. Townley defaulted on August 29, 2003, and on November 23, 2005, the district court entered a judgment for $7,259,700. Order for Def. J. Against Michael Vernon Townley, *Gonzalez-Vera v. Kissinger*, No. 02-2240 (Nov. 23, 2005).

III. Procedural Background

Ms. González-Vera sought execution and satisfaction of her judgment against Mr. Townley by contacting the Department of Justice (DOJ) and Mr. Townley's private counsel. *See Gonzalez-Vera*, 595 F.3d at 380–81. Mr. Townley responded with silence, providing neither payment nor any indication of a willingness to make efforts toward satisfying the judgment.

On February 2, 2007, Ms. González-Vera sent a letter to the Attorney General requesting disclosure of Mr. Townley's identity and location for the sole and exclusive purpose of enforcing her legal rights against Mr. Townley. *Id.* Receiving no response, Ms. González-Vera sent a second letter on April 12, 2007. Stephen J. T'Kach, Director of WSP, subsequently reviewed affidavits supplied through Mr. Townley's private counsel (who have represented him since the 1970s) regarding Mr. Townley's financial assets. *Id.* at 381. Relying only on this secret and unverified material that was never

shared with the court, Mr. T'Kach both informed Mr. Townley's counsel on June 1, 2007, "that it [was] not unreasonable for [Mr. Townley] to pay $75.00 per week to satisfy this debt" and requested Mr. Townley's opinion regarding the offer's reasonableness. *Id.* By June 1, 2007, however, Ms. González-Vera had already filed a timely complaint in the district court for the appointment of a guardian to enforce her judgment against Mr. Townley. *See* § 3523(b)(1), (b)(3).

Relying on the statute's language, Ms. González-Vera argued that her judgment against Mr. Townley, as well as the Attorney General's declination to disclose Mr. Townley's identity and location, entitled her to a court-appointed guardian. *Gonzalez-Vera*, 597 F. Supp. 2d at 101; *see also* § 3523(b)(3). The guardian would protect Mr. Townley's identity and report to the court. *See* § 3523(b)(4). In response, DOJ argued that the court may only appoint a guardian where the Attorney General is authorized to make the decision regarding disclosure. *Gonzalez-Vera*, 597 F. Supp. 2d at 101. DOJ further asserted that the Attorney General can only make such a decision if he first determines that the protected debtor will not make reasonable efforts toward payment of the judgment. *Id.*

Adopting DOJ's interpretation, on February 18, 2009, the district court denied Ms. González-Vera's motion for summary judgment and granted DOJ's motion to dismiss. *See id.* at 101, 103. The district court found that Mr. Townley's possible and prospective reasonable efforts precluded any

potential for disclosure; the Attorney General could not--and therefore would not—make a decision whether to disclose Mr. Townley's identity and location. *See id.* at 101–02.

On February 23, 2010, the court of appeals affirmed on the same grounds, noting that "where, as here, the Attorney General 'determines' that the protected person is making reasonable efforts, the statute gives him no authority to disclose to the judgment-holder." *See Gonzalez-Vera*, 595 F.3d at 381. Mr. Townley, however, had failed to pay a single cent toward the judgment, despite the Attorney General's position that any promise to pay fulfilled the statutory obligation. Ultimately, the court of appeals recognized that its ruling "[left] González-Vera, though dissatisfied with Mr. Townley's efforts to pay, without a remedy in these proceedings." *Id.* at 384.[8] This decision rendered the avenues of enforcement assistance created by § 3523(a) and (b) effectively unavailable to Ms. González-Vera.

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[8] Following the court of appeals' opinion, Mr. T'Kach sent a letter to Mr. Townley asking whether $75 per week was still reasonable to pay, and Mr. Townley has submitted payments for the past three months. Nevertheless, for more than four years following the $7.2 million judgment and more than thirty years following Mr. Soria's murder, Mr. Townley evaded his legal obligations while Ms. González-Vera received unfulfilled promises of payment.

REASONS FOR GRANTING THE PETITION

The court of appeals' misinterpretation of an important federal statute empowers the Attorney General to revert to pre-reform processes of judgment enforcement and prevents any judgment holder from ever exercising the statutory right to seek judicial enforcement assistance. Departure from congressional design jeopardizes the proper functioning of WSP, an essential prosecutorial tool with broad national implications. Precluding judicial access will effectively bar these issues from returning to federal court, demonstrating that this Court must remedy the problems exemplified by this case. Further, the court of appeals' departure from this Court's precedent warrants this Court's attention.

This case raises three reasons for granting the petition. First, the court of appeals' construction deviates from this Court's well-established principles for statutory interpretation and judicial oversight. Specifically, this interpretation has altered verb tenses and added language modifying the statute's requirements, which inappropriately enhances the Attorney General's enforcement role. This directly frustrates the evident congressional purpose for enacting § 3523 and reverts to previously rejected WSP practices. Also, the court of appeals has limited judicial oversight despite Congress' clear intention to provide judicial access where a judgment holder is unable to enforce a judgment.

Second, the court of appeals' interpretation expands the Attorney General's statutory authority, raising important separation of powers concerns. The Attorney General already serves a dual role as the protector of WSP participants and the enforcer of judgments held against WSP participants. Under the lower courts' reading of the statute, the Attorney General exercises this power without limitation and to the exclusion of the judiciary. The Attorney General, acting under a conflict of interest, is thereby imbued with the sole authority to enforce a judgment against a protected debtor.

Finally, allowing protected debtors to evade the satisfaction of judgments violates innocent third parties' due process rights. The court of appeals' interpretation of § 3523 enables the Attorney General to perpetually stall enforcement of validly held judgments based on pretextual concerns of protected debtors' security. Contrary to these pretextual concerns, however, § 3523 ensures the satisfaction of judgments while protecting the security of WSP participants.

Unlike DOJ's construction, which the court of appeals adopted, Petitioners' reading of § 3523 avoids raising these three problematic issues. As the court of appeals' decision has profound implications for individuals holding valid judgments against protected debtors, this case presents an opportunity for this Court to clarify the statute.

I. The Court of Appeals' Interpretation of § 3523 Contradicts this Court's Precedent and Inhibits the WSP from Functioning Within its Statutory Framework.

Misconstruing this statute deviates from this Court's precedent in three important respects. First, the court of appeals modified the statute's requirements by altering verb tenses and adding language, thereby enhancing the Attorney General's authority. Second, such interpretation deviates from § 3523's congressional purpose and regresses enforcement procedures to pre-enactment policies. Third, this construction ignores this Court's long-standing and recently reaffirmed preference for judicial oversight.

A. Altering the Statutory Language Deviates From this Court's Precedent.

Departing from this Court's deep-rooted precedent, the court of appeals failed to follow the plain language of § 3523. *Consumer Prod. Safety Com. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself."). The court of appeals' variation of specific statutory terms deviates from the standard that courts "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296 (2006). Rather, the court of appeals altered verb tenses in § 3523(a) and added phrases to § 3523(b). Consequently, it offended Congress'

chosen words, which Congress chose specifically to provide judgment holders with enforcement assistance.[9]

Section 3523(a) requires the Attorney General to assess what efforts the protected debtor has already made to comply with the judgment.[10] The court of appeals, however, amended the explicit language by equating a determination based on what efforts the protected debtor "has" made with what the protected debtor "is," "will," or "would" promise to make. *See, e.g.*, *Gonzalez-Vera*, 595 F.3d at 380 ("That provision requires the Attorney General to determine whether the protected person *is making* 'reasonable efforts.'") (emphasis added); *id.* (holding that appointment of a guardian is only appropriate "where, as here, the Attorney General finds that the protected person *will make* reasonable efforts to pay.") (emphasis in original); *id.* ("Having found that Townley *would make* reasonable efforts, the Attorney General had 'no choice, no discretion, no decision.'") (emphasis added).

Such modification directly contradicts this Court's holding that "Congress' use of a verb tense is

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[9] *Compare Hermanson*, 2008 WL 2856470, at *4 (defining "Attorney General" strictly as the Attorney General and not his appointees) *with Gonzalez-Vera*, 595 F.3d at 380 (changing or adding terms of § 3523 to fit DOJ's interpretation).

[10] *See* § 3523(a) ("[T]he Attorney General shall determine whether the person has made reasonable efforts to comply with the judgment.... If the Attorney General determines that the person has not made reasonable efforts to comply [the Attorney General must take specific action].").

significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992). Recently, this Court emphasized that a statute's use of present tense was a "striking indic[ator] of its prospective orientation." *Carr v. United States*, 130 S. Ct. 2229, 2237 (2010)(internal quotations omitted). By confusing verb tenses, the court of appeals converted a determination that should be based on concrete past efforts into a malleable, prospective determination.

The alteration empowers the Attorney General to arbitrarily create procedures unintended by the statute's language. For example, rather than reviewing objective past efforts, the Director of WSP asked Mr. Townley if a promise to pay $75 per week was reasonable to him based on financial information provided by Mr. Townley himself. This inquiry transferred what should have been an executive determination to the protected debtor, allowing the debtor himself to fulfill the executive's statutory obligations. Additionally, the variation imposes on judgment holders the burden to continuously accept promises, often to no avail. If the judgment holder does not accept the promise to pay, she must forfeit enforcement assistance altogether.

The court of appeals further misinterpreted the statute and offended this Court's precedent by inserting a "reasonable efforts" requirement into

§ 3523(b).[11] Section 3523(b) allows a judgment holder to petition the court to appoint a guardian when the Attorney General, in the face of a judgment holder's request, refuses to disclose the protected debtor's information. *See* § 3523(b)(1), (b)(3). The Attorney General is authorized to come to court only to affirm or deny that a request was made and need not specify why he denied disclosure. *See* § 3523(b)(2). Although Congress mentioned reasonable efforts in § 3523(a), Congress excluded any such reference in the entirety of § 3523(b). The court of appeals thus deviated from this Court's recognition that where Congress includes "particular language in one section of a statute but omits it in another...it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (internal quotations omitted); *see also Prisco v. Talty*, 993 F.2d 21, 25 (3d Cir. 1993) (interpreting a WSP statute as "raising the inference that where Congress did not explicitly provide, it did not intend" when Congress included a provision in one section but did not include it in another).

The misconstruction of the statutory language contradicts this Court's preference for a plain language reading. The court of appeals' alteration enables the Attorney General to make determinations based on prospective promises and to

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[11] *See* § 3523(b)(1) ("Any person who holds a judgment...may, upon a decision by the Attorney General to deny disclosure of the current identity and location of such protected person, bring an action against the protected person... .").

object to the appointment of a guardian. Under such interpretation, the Attorney General can avoid the determination that a protected debtor has not made reasonable efforts. For example, the Attorney General can determine that empty promises are sufficient, determine that making no payment is reasonable, make a faulty determination, or fail to make any determination at all. If the court of appeals' interpretation stands, the Attorney General would never be authorized to disclose the protected debtor's information in these situations. Thus, even when the protected debtor is paying nothing, the Attorney General could prevent the judgment holder from utilizing effective assistance under § 3523(a) or § 3523(b). By refraining from making a final agency decision regarding disclosure, the Attorney General, in effect, renders the entirety of § 3523(b) meaningless. The statutory language does not authorize such an expansive interpretation.

B. An Interpretation of the Statute that Reverts to Previously Rejected Practices Violates this Court's Precedent.

This Court disfavors statutory constructions that revert to pre-enactment practices. *See J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) ("[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."); *see also Flowers v. Dep't of Health & Human Servs.*, 49 F.3d 1558, 1561 (Fed. Cir. 1995) (dismissing a construction of federal

statutory provision that "would essentially read back into the current version of the statute a part of the very language that Congress removed"). The court of appeals' interpretation directly frustrates Congress' purpose for enacting § 3523 and reverts to previously rejected practices under WSP, which conflicts with the opinions of this Court.

An interpretation of a statute that reverses the statute's congressional purpose is unacceptable, as "[t]o give such effect to the action of congress [sic] in codifying the statue[] would go far to subvert all decisions, and introduce chaos into our jurisprudence." *Crenshew v. United States*, 134 U.S. 99, 109 (1890). By empowering the Attorney General to prevent appointment of a guardian, judgment holders are left only with pre-enactment administrative remedy, which proved ineffective.

The court of appeals failed to recognize that its interpretation, which overlooks the Reform Act's purpose, reverts to former practices rejected by the Reform Act. The court of appeals' failure to consider the Reform Act's purpose departs from precedent in other circuits that have relied on legislative history to interpret the Reform Act. *See, e.g., Prisco v. Talty*, 993 F.2d 21, 25–26 (3d Cir. 1993) (giving heavy consideration to WSP's pre-enactment history and noting that "[c]ourts are obliged to implement the policy and intent of the legislature, and we believe that our holding furthers the purposes of the entire legislative scheme"). The court of appeals' interpretation, then, departs not only from this

Court's precedent, but also conflicts with other circuits' holdings.

C. The Court of Appeals' Decision Inhibits Judicial Oversight Explicitly Provided for in the Statute Contrary to this Court's Precedent.

By allowing the Attorney General the power to deny every judgment holder a court-appointed guardian, the court of appeals violated this Court's case law presuming judicial oversight. *See, e.g., Kucana v. Holder*, 130 S. Ct. 827 (2010). The court of appeals' decision grants the Attorney General unfettered discretion, even though the Attorney General is concurrently protecting WSP participants and tasked with providing enforcement assistance to judgment holders. In addition, the decision infringes on congressional and judicial functions, violating the separation of powers principle. Judicial access, in the form of a guardian, not only upholds the statute's plain language and Congress' amendment to DOJ's enforcement policy, but importantly prevents agency capture, safeguards separation of powers, and allows victims redress.

The court of appeals ignored this Court's long-standing and recently reaffirmed preference for judicial oversight. *See Kucana v. Holder*, 130 S. Ct. 827 (2010). This Court has long recognized a "well settled" "presumption favoring interpretations of statutes [to] allow judicial review of administrative action." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63–64 (1993) (quoting *McNary v. Haitian*

Refugee Ctr., Inc., 498 U.S. 479, 496 (1991)). In addition, this Court assumes that "Congress legislates with knowledge of" the presumption. *McNary*, 498 U.S. at 496. Judicial oversight is particularly important in cases concerning the preservation of federal court jurisdiction. *See Catholic Soc. Servs., Inc.*, 509 U.S. at 63–64. When a statute is "reasonably susceptible to divergent interpretation," this Court adopts the reading "that executive determinations generally are subject to judicial review." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995).

Here, the court of appeals violated this Court's precedent by precluding the intended judicial remedy. Congress did not intend to inhibit judicial review in § 3523, as evidenced in two ways. First, another section of the Reform Act, 18 U.S.C. § 3521, explicitly provides that the Attorney General's decision "shall not be subject to judicial review." § 3521(f). Section 3523 lacks any such language, which suggests the omission was intentional. *See Russello*, 464 U.S. at 23 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Second, an entire subsection of § 3523 provides for a judicial oversight mechanism in the form a court-appointed guardian. *See* § 3523(b). Congress created a judicial mechanism to provide a remedy that would change the previous blanket nondisclosure policy, uphold judgment holders'

enforcement rights, and protect protected debtors' security. *See id.*

II. This Case Raises Important Separation of Powers and Federalism Concerns.

The Attorney General's ability to limit judicial access through his expanded bureaucratic powers calls into question separation of powers and federalism principles. This Court has recognized that "[s]eparation-of-powers concerns...caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain." *Kucana v. Holder*, 130 S. Ct. 827, 831 (2010). Enforcement of monetary judgments is typically within the judiciary's domain. *See* Fed. R. Civ. P. 69(a); *Peacock v. Thomas*, 516 U.S. 349, 359 (1996) (describing federal courts' "fast and effective mechanisms" that "protect and aid the collection of a federal judgment"). The executive lacks the expertise to enforce monetary judgments, and this Court has been reluctant to cede authority where the executive lacks expertise. *Cf. Gonzales v. Oregon*, 546 U.S. 243, 266 (2006) (discussing the Court's unwillingness to cede authority to the Attorney General to make essentially medical decisions when the Attorney General lacks medical expertise).

Further, the court of appeals' interpretation permits the Attorney General to have multiple roles that conflict with separation of powers principles. Under its interpretation, the Attorney General acts as the executive, judiciary, legislature, and private

attorney. In effect, the Attorney General is the gatekeeper to judicial enforcement assistance. He fills this role even though he does not have consistent standards, is not confirmed by the Congress, is not charged with writing or interpreting of the law, and is not an enforcement expert.

A. The Court of Appeals' Interpretation Cedes Judicial Functions to the Executive and Overrides State and Federal Law.

The court of appeals' interpretation allows the Attorney General to infringe on courts' powers to issue meaningful judgments, to review administrative decisions, and to enforce judicial remedies.

This Court has long recognized that courts have the inherent power to enforce their orders and judgments. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *Shillitani v. United States*, 384 U.S. 364, 370 (1966); *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) ("Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government."). Although the Attorney General has been tasked with assisting enforcement of judgments, an executive officer cannot bear sole responsibility for enforcing judgments because enforcement of judgments is a function of the judiciary. *See Cent. Nat'l Bank of Boston v. Stevens*, 169 U.S. 432, 464 (1898) ("The

jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until the judgment shall be satisfied."); *id.* at 465 ("But it is scarcely necessary to quote authorities to show that to deprive a court of the power to execute its decrees is to essentially impair its jurisdiction.").

Pursuant to Fed. R. Civ. P. 69(a), judgment holders may seek judicial assistance in determining the debtor's capacity to satisfy the judgment by obtaining discovery. *See Peacock,* 516 U.S. at 359. Courts independently balance what a protected debtor needs to live on and what is owed to the judgment holder. Rule 69(a)(1) gives federal judgment creditors all legal rights of the state where the judgment was entered, including any state where the judgment may have been registered. *See also* 28 U.S.C. § 1963. The Attorney General's claim of unreviewable power thus nullifies not only the federal rules but also the execution of judgment laws of all the states and territories and the District of Columbia.

Also, the Attorney General lacks expertise as a financial investigator. The judiciary, on the other hand, has expertise in enforcing its own judgments, as such assistance is typically provided by the courts and begins with a debtor's examination. Thus, rather than the Attorney General determining reasonable efforts, the court-appointed guardian is equally if not better suited to make the independent determination. Without judicial access, a judgment holder must rely on the debtor who only discloses his financial information to the Attorney General, an

officer charged with protecting the debtor in many capacities.

Meanwhile courts have expertise in the security concerns that DOJ emphasizes with respect to WSP and § 3523. Not only is the court-appointed guardian statutorily provided for in § 3523(b) designed to maximize the security of WSP participants,[12] but courts have long investigated matters of highly important sensitivity. *See, e.g.*, *United States v. Moussaoui*, 382 F.3d 453, 456 (4th Cir. 2004) (using procedures under the Classified Information Procedures Act (18 U.S.C. App. III. §§ 1-16) to obtain discovery materials and allowing use of alternate names and places for protective purposes); *United States v. Rezaq*, 134 F.3d 1121, 1142–43 (D.C. Cir. 1998) (affirming the trial court's substitution of summaries for classified information in criminal trial and finding that "district court did a commendable job of discharging its obligations"); *see also United States v. Reynolds*, 345 U.S. 1 (1953) (mandating judicial decision if state secrets provision is invoked).

The court's ability to protect WSP participants is especially bolstered by the previous appointment of a guardian for Mr. Townley in 1984. *See Letelier v. Chile*, 748 F.2d 790 (2d Cir. 1984). There, the same district court recognized that "[b]ecause the Attorney General declined to disclose to the petitioners the current identity and location of the

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[12] *See* § 3523(b)(4) ("The guardian shall...carry out such enforcement duties in a manner that maximizes...the safety and security of the protected person.").

protected person, the court...appointed a guardian to enforce the judgment on the petitioner's behalf." Memorandum and Order, *Letelier v. Townley*, No. 85-0761 (March 16, 1987). Today, Mr. Townley remains safe; the previous guardian never jeopardized his identity and location. The federal courts have demonstrated their ability to use the §3523(b) guardian mechanism to seek judgment enforcement while maintaining WSP integrity. Therefore, federal courts, not the Attorney General, should be responsible for ensuring judicial remedies.

Finally, the court of appeals' interpretation permits the Attorney General to determine questions of law, a function reserved to the judiciary when Congress has not delegated such interpretive power to the agency. *See* Administrative Procedure Act, 5 U.S.C. § 706 (2010) ("[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").[13] Congress designed § 3523 to

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[13] Section 706 states:

> The reviewing court shall: (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law.

provide the Attorney General with specific functions: administrative enforcement assistance, as specified in § 3523(a), and judicial assistance, as specified in § 3523(b). The Attorney General has a limited role in the judicial process. He is required to appear in court only to affirm or deny whether the petitioner requested the Attorney General to disclose the identity and location of the protected debtor.

B. The Attorney General's Multiple Roles Raise a Conflict of Interest.

The Attorney General is problematically failing to perform his limited statutorily articulated duties, instead performing a combination of functions. Under the statute, the Attorney General must disclose the identity and location of the protected debtor either to the judgment holder under § 3523(a) or to the court-appointed guardian under § 3523(b). But, with the support of the court of appeals, the Attorney General has expanded his duties beyond disclosing or not disclosing the location and identity of a WSP participant.

Here, the Attorney General is simultaneously counsel for Mr. Townley, the protected debtor, and the enforcer of Mr. Townley's outstanding obligations. Instead of conducting an investigation himself, the Attorney General asked the protected debtor, who has previously falsified information,[14]

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[14] In 1985, the court appointed a guardian to investigate Mr. Townley's capacity to pay a different judgment for different plaintiffs. The guardian determined that Mr. Townley, who swore he had no income, actually had an income of $1,000 per

both to provide unverified financial information and to determine the reasonableness of a payment schedule.

According to the long-established maxim *aliquis non debet esse judex in propria causa*, nobody should be judge in his own cause. *See Bonham's Case*, 8 Coke Rep. 113b, 77 Eng. Rep. 646 (Ct. of King's Bench 1609). More recently, this Court affirmed that a conflict of interest is created when an administrator has the dual role of evaluating eligibility for benefits and paying benefits out of its own pocket. *See Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008)(internal quotations omitted). A reviewing court must consider what impact of a conflict of interest has on an administrator's potential abuse of discretionary authority to deny benefits. *Id.*

III. Satisfaction of Valid Judgments is an Issue of Exceptional National Importance.

The court of appeals' misreading of § 3523 avoidably creates a right without a remedy and raises fundamental due process concerns. A reasonable interpretation of § 3523, however, appropriately balances the interests of WSP with those of third party judgment creditors. Adopting such a balance, Petitioners' interpretation comports with the statutory text and congressional concern.

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month. In addition, Mr. Townley has admitted to money laundering and using numerous aliases.

A. A Reasonable Interpretation of the Statute Creates both a Right and a Remedy.

Section 3523 entitles judgment holders like Ms. González-Vera to seek administrative and judicial assistance in investigating a protected debtor's financial assets. *See* § 3523. If the Attorney General does not disclose the protected debtor's information to the judgment holder in the face of a request, the balance between security and enforcement is realized through the judicial appointment of a guardian. *See* H.R. Rep. No. 98-767, at 23 (1984) ("The use of a guardian is calculated to maximize the security of the protected witness."). The guardian can then carry out the judgment holder's enforcement rights. § 3523(b)(5). Conversely, the court of appeals' decision renders § 3523(b) meaningless, violating this Court's long-standing precedent that a "right without a remedy is unknown to the law." *Barret v. Homes*, 102 U.S. 651, 653 (1880).

Congress intended to provide judgment holders the right to seek effective enforcement assistance and judicial access. Most illustrative is the statute itself: although § 3523(a) reflects the executive's previous administrative policy, Congress enacted § 3523(b) to provide judicial redress through a court-appointed guardian. The statute provides a court-appointed guardian when the Attorney General declines to disclose the protected debtor's identity and location to the judgment holder. Under the court of appeals' interpretation, however, the

Attorney General can prevent any judgment holder from ever petitioning the court to appoint a guardian by merely ignoring requests for disclosure. Congress did not provide the Attorney General with the discretion to unilaterally prevent access to an intended judicial remedy, which would render an entire subsection meaningless and powerless. *See Parden v. Terminal Ry. of Ala. State Docks Dept.*, 377 US 184, 190 (1964) ("We are unwilling to conclude that Congress intended so pointless and frustrating a result.").

B. A Reasonable Interpretation of the Statute Upholds Judgment Holders' Due Process Rights.

The court of appeals' interpretation raises due process concerns, which Congress' statutory design avoids. The Fifth Amendment provides that "[n]o person shall be deprived of...property, without due process of law." U.S. Const. amend. V. A final judgment represents a property right for "[w]hen [it has] passed into judgment the right becomes absolute, and it is the duty of the court to enforce it." *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 431 (1856); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) ("Finality of a legal judgment is determined by statute, just as entitlement to a government benefit is a statutory creation; but that no more deprives the former of its constitutional significance for separation-of-powers analysis than it deprives the latter of its significance for due process purposes."). A due process concern inevitably arises when judgment holders are

deprived of their right to enforce a final judgment without notice or hearing. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

By allowing judgment holders to seek the benefit of enforcement assistance from the executive, § 3523 creates a statutory right that cannot be denied without due process of law. Section 3523 is intended to secure enforcement of judgments via proper assistance from the executive and access the judiciary. *See supra* notes 3–6 and accompanying text. To the contrary, the court of appeals' interpretation dismisses the statute's purpose and allows the Attorney General to avoid disclosure to both judgment holders and court-appointed guardians. The refusal to disclose and the preclusion of access to federal courts contradict the judgment holder's statutory right to seek investigative assistance. Through non-delegated authority, the Attorney General's power to defeat an entire subsection and foreclose appointment of a guardian denies a judgment holder of her property interest in the judgment and statutory right without due process of law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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July 30, 2010

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5134

Laura Gonzalez-Vera and Ali Abed Beydoun,
as personal representative of the estate of
Carmelo Soria Espinoza, deceased,
Appellants
v.
Michael Vernon Townley, et al.,
Appellees

Argued January 12, 2010
Decided February 23, 2010

Appeal from the United States District Court
for the District of Columbia
(No. 1:07-cv-00995-HHK)

Sarah Melikian, Student Counsel, argued the cause for appellants. On the briefs was *Ali A. Beydoun*, Supervisory Attorney.

Abby C. Wright, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief was *Mark B. Stern*, Attorney. *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Before: HENDERSON and TATEL, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: How does one enforce a civil judgment against a person protected by the Witness Security Program? Congress, it turns out, answered this question in 18 U.S.C. § 3523. That provision requires the Attorney General to determine whether the protected person is making "reasonable efforts" to satisfy the judgment and establishes procedures for collecting the judgment if the person is failing to do so. In this case, the Attorney General found that a protected person would make reasonable efforts to pay a judgment owed to appellant. Dissatisfied, appellant sought to invoke one of section 3523's enforcement procedures— appointment of a guardian to help collect the judgment. Under these circumstances, the district court held, section 3523 does not authorize appointment of a guardian. For the reasons set forth in this opinion, we agree.

I.

On September 21, 1976, former Chilean ambassador and foreign minister Orlando Letelier and his assistant Ronni Moffitt were assassinated as they drove to their office in Washington, D.C. Michael Vernon Townley, an American citizen and agent of Chilean President Augusto Pinochet's intelligence service, Dirección de Intelligencia Nacional, admitted his complicity in the killings, testified in the criminal proceedings, and pleaded guilty to one count of conspiracy to murder a foreign official. *United States v. Sampol*, 636 F.2d 621, 629 & n.3 (D.C. Cir. 1980). After serving five years in prison, Townley entered the Witness Security Program (WSP), commonly known as the Witness

Protection Program. Through the WSP, the Attorney General may relocate and protect witnesses whose safety is at risk. 18 U.S.C. § 3521(a)(1). Such protection may include the creation of a new identity. *Id.* § 3521(b)(1)(A).

In the years following the two assassinations, Townley's involvement in various other crimes came to light. In particular, he was linked to the July 1976 torture and murder of Carmelo Soria Espinoza ("Soria"), a United Nations diplomat then living and working in Chile. In November 2002, Soria's widow, Laura Gonzalez-Vera, along with the personal representative of Soria's estate, sued Townley seeking damages for Soria's torture and killing. When Townley defaulted, the district court entered a $7 million judgment against him. *Gonzalez-Vera v. Kissinger*, No. 0202240, Order for Default Judgment (D.D.C. Nov. 23, 2005).

Gonzalez-Vera then asked the Attorney General to help collect the judgment pursuant to 18 U.S.C. § 3523. Subsection (a) of that provision states that if a civil judgment is entered against a person enrolled in the WSP, "the Attorney General shall determine whether the [protected] person has made reasonable efforts to comply with the judgment" and "shall . . . urge the person to comply with the judgment." In language central to this case, subsection (a) states:

> If the Attorney General determines that the person has not made reasonable efforts to comply with the judgment, the Attorney General may, after considering the danger to the person and upon the request of the person

> holding the judgment disclose the identity and location of the person to the plaintiff entitled to recovery pursuant to the judgment.

In response to Gonzalez-Vera's request, the United States Marshals Service informed Townley that unless he took satisfactory steps to comply with the judgment, his identity and location could be disclosed pursuant to subsection (a). Townley responded with an affidavit describing his present assets, debts, income, and financial history. Based on that affidavit, the WSP Director, to whom the Attorney General has delegated his authority on such issues, determined that "it is not unreasonable for [Townley] to pay $75 per week" toward the judgment. Letter from Stephen J. T'Kach, Director, U.S. Department of Justice Witness Security Program, to Jeffery M. Johnson, Dickstein Shapiro LLP (June 1, 2007). Townley agreed, but according to the Director, Gonzalez-Vera rejected the arrangement and so has received no payments. Although Gonzalez-Vera has a different view of what transpired, this disagreement is irrelevant to the statutory question we face here.

Gonzalez-Vera then sued Townley and the Attorney General in the United States District Court for the District of Columbia pursuant to section 3523(b)(1), which provides that any person who holds a judgment against a WSP participant "may, upon a decision by the Attorney General to deny disclosure of the current identity and location of such protected person, bring an action against the protected person in the United States district court." If the petitioner in fact holds a judgment and if the

court finds "that the Attorney General has declined to disclose to the petitioner the current identity and location of the protected person," then subsection (b)(3) requires the court to "appoint a guardian to act on behalf of the petitioner." § 3523(b)(3). The Attorney General must then disclose to the guardian the protected person's identity and location. *Id.*

The Attorney General moved to dismiss, arguing that subsection (b)(1) makes a guardianship proceeding available only where the Attorney General determines that the protected person is failing to make reasonable efforts to comply but, "after considering the danger to the [protected] person," § 3523(a), nonetheless declines to disclose the person's identity and location. Subsection (b)(1) does not, the Attorney General insisted, allow the judgment-holder to sue for the appointment of a guardian, where, as here, the Attorney General finds that the protected person *will* make reasonable efforts to pay.

Agreeing with the Attorney General, the district court emphasized that "the statute authorizes plaintiffs to bring this action only 'upon a *decision* by the Attorney General to deny disclosure'"—a decision, the district court held, the Attorney General had no authority to make "because § 3523(a) does not authorize . . . disclosure unless the [Attorney General] determines that Townley has not made reasonable efforts to comply with the judgment." *Gonzalez-Vera v. Townley*, 597 F. Supp. 2d 98, 102, 101 (D.D.C. 2009) (quoting § 3523(b)(1)). Having found that Townley would make reasonable efforts, the Attorney General "had no choice, no discretion, no decision." *Id.* at 102. Because

Gonzalez-Vera "lack[ed] statutory authorization to bring this suit," the district court dismissed the case. *Id.*

Gonzalez-Vera appeals, arguing that the district court misinterpreted the statute. We review de novo the district court's grant of a motion to dismiss, *see, e.g., Piersall v. Winter*, 435 F.3d 319, 321 (D.C. Cir. 2006), as well as its resolution of this "pure question of statutory interpretation," *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1237 (D.C. Cir. 2008); *see also Murphy Exploration and Prod. Co. v. Dep't of Interior*, 252 F.3d 473, 478–79 (D.C. Cir. 2001) (agency's construction of a statute receives no deference where statute grants judicial power to the courts rather than administrative power to the agency).

II.

As noted above, section 3523(b)(1) permits a judgment-holder to sue for the appointment of a guardian "upon a decision by the Attorney General to deny disclosure." Because this case turns on the meaning of that phrase and its relationship to the process described in subsection (a), we think it helpful to begin by quoting the relevant provisions of the statute in full:

> (a) If a judgment . . . is entered against [a protected] person the Attorney General shall determine whether the person has made reasonable efforts to comply with the judgment. . . . If the Attorney General determines that the person has not made reasonable efforts to comply with the judgment, the Attorney

General may, after considering the danger to the person and upon the request of the person holding the judgment disclose the identity and location of the person to the plaintiff entitled to recovery pursuant to the judgment. . . .

(b) (1) Any person who holds a judgment entered by a Federal or State court in his or her favor against a person provided protection under this chapter may, upon a decision by the Attorney General to deny disclosure of the current identity and location of such protected person, bring an action against the protected person in the United States district court in the district where the person holding the judgment . . . resides. . . .

(3) Upon a determination (A) that the petitioner holds a judgment entered by a Federal or State court and (B) that the Attorney General has declined to disclose to the petitioner the current identity and location of the protected person against whom the judgment was entered, the court shall appoint a guardian to act on behalf of the petitioner to enforce the judgment. . . . The Attorney General shall disclose to the guardian the current identity and location of the protected person and any other information necessary to enable the guardian to carry out his or her

duties under this subsection. . . .

18 U.S.C. § 3523.

The parties agree that the Attorney General makes a "decision . . . to deny disclosure" within the meaning of subsection (b)(1) when he (1) finds that the protected person is failing to make reasonable efforts to comply with the judgment but (2) nonetheless declines to disclose because disclosure of the protected person's identity and location would endanger that person. According to Gonzalez-Vera, the Attorney General also makes a "decision . . . to deny disclosure" where, as here, he determines that the protected person *is* making reasonable efforts to satisfy the judgment, and thus does not disclose the protected person's identity and location. In support, Gonzalez-Vera relies on two features of section 3523. First, she points out that nothing in subsection (a) expressly bars the Attorney General from disclosing the protected person's information if he determines that reasonable efforts *are* being made. In other words, she argues, the Attorney General has authority to disclose and thus can make a "decision . . . to deny disclosure" even where he finds that the protected person is making reasonable efforts. Second, she emphasizes that subsection (b) nowhere references the reasonable-efforts determination required by subsection (a), thus demonstrating that these two subsections provide "two independent mechanisms to assist with enforcement of an outstanding judgment." Appellant's Br. 8. Accordingly, she concludes, subsection (b)(1)'s guardianship proceeding is available regardless of the outcome of subsection (a)'s reasonable-efforts determination.

Like the district court, we find Gonzalez Vera's position inconsistent with the statute's text. Under subsection (a), the Attorney General begins by "determin[ing] whether the [protected] person has made reasonable efforts to comply with the judgment." "If" the answer is no, the statute gives the Attorney General two choices. He "may" disclose the protected person's identity and location to the judgment-holder or, if doing so would endanger the protected person, he "may" decline to disclose, in which case the judgment-holder can invoke subsection (b)(1) and seek appointment of a guardian. But where, as here, the Attorney General "determines" that the protected person *is* making reasonable efforts, the statute gives him no authority to disclose to the judgment holder. *Cf. United Mine Workers of Am. v. Mine Safety and Health Admin.*, 823 F.2d 608, 618 (D.C. Cir. 1987) (reading 30 U.S.C. § 815(b)(2), which states that the agency "may grant . . . [temporary] relief if" one of several conditions is met, as authorizing it to grant such relief *only* if one of the delineated conditions is met). In that circumstance, the judgment-holder has no authority to initiate subsection (b)'s guardianship proceedings because, by its terms, subsection (b)(1) is triggered only "upon a *decision* by the Attorney General to deny disclosure" – a decision the Attorney General can make only if the protected person is *not* making reasonable efforts to satisfy the judgment. § 3523(b)(1) (emphasis added).

Nor do we agree with Gonzalez-Vera that "[b]ecause Congress explicitly included language addressing reasonable efforts in § 3523(a), the omission of similar language in § 3523(b)

demonstrates that Congress purposefully excluded a requirement from § 3523(b) that the Attorney General make a reasonable efforts determination." Appellant's Br. 12. As previously noted, subsection (a) provides that if the Attorney General finds that a protected person is not making reasonable efforts to comply, "the Attorney General may . . . disclose the identity and location of the person" to the judgment-holder. Subsection (b) repeatedly refers back to this language. Specifically, subsection (b)(1) states that the judgment holder "may, upon a decision by the [Attorney General] to deny disclosure . . . bring an action." Similarly, subsection (b)(3) states that, before appointing a guardian, the court must determine that the Attorney General has "declined to disclose to the petitioner the current identity and location of the protected person." By using this language consistently throughout section 3523, we think it clear that Congress intended to make the availability of subsection (b)'s guardianship provision dependent upon the Attorney General's subsection (a) decision to deny disclosure. *See Am. Fed'n of Gov't Employees, Local 2782 v. Fed. Labor Relations Auth.*, 803 F.2d 737, 740 (D.C. Cir. 1986) ("It is a generally accepted precept of interpretation that statutes or regulations are to be read as a whole, with 'each part or section . . . construed in connection with every other part or section.'") (citation omitted) (ellipsis in original).

This result makes sense. Under Gonzalez-Vera's interpretation of subsection (b), guardianship would become available in *every* case in which the protected person's identity and location are not disclosed to the judgment-holder, including cases—

like this one—in which the Attorney General determines that the protected person *is* making reasonable efforts to satisfy the judgment. But given the statute's language and structure, and the risks of disclosing a protected person's identity and location even to a court-appointed guardian, we think it clear that Congress intended to make guardianship available only where the Attorney General finds that the protected person is failing to make reasonable efforts—that is, only where disclosure to a guardian is necessary to enforce the judgment. We realize this leaves Gonzalez-Vera, though dissatisfied with Townley's efforts to pay, without a remedy in these proceedings. As the Attorney General acknowledged at oral argument, however, she remains free to seek a fresh subsection (a) determination should she have reason to believe that Townley's financial circumstances may have changed.

Finally, Gonzalez-Vera contends that our interpretation of section 3523 presents two avoidable constitutional concerns. Citing *Hayburn's Case*, 2 U.S. 408, 410 (1792), she first argues that by blocking a guardianship proceeding, the Attorney General is, in effect, "revis[ing] or overturn[ing] a final decision by an Article III court." Appellant's Br. 22. Second, she argues that, as interpreted by the district court, section 3523 violates the Fifth Amendment by depriving her of her judgment, as well as the statutory right to a guardian, without due process of law. But because Gonzalez-Vera advanced neither of these arguments in the district court, she may not do so here. *See, e.g., Trout v. Sec'y of the Navy*, 540 F.3d 442, 448 (D.C. Cir. 2008). To be sure, as Gonzalez-Vera reminds us, waiver is a

discretionary doctrine, but we think it clear that no "plain miscarriage of justice" will result from our declining to consider these arguments. *Hormel v. Helvering*, 312 U.S. 552, 558 (1941).

We affirm the district court's order dismissing the case.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5134

Laura Gonzalez-Vera and Ali Abed Beydoun,
as personal representative of the estate of
Carmelo Soria Espinoza, deceased,
Appellants
v.
Michael Vernon Townley, et al.,
Appellees

Filed February 23, 2010

Appeal from the United States District Court
for the District of Columbia
(No. 1:07-cv-00995-HHK)

BEFORE: HENDERSON and TATEL, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the Judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the pinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail, Deputy Clerk

Opinion for the court filed by Circuit Judge Tatel.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 07-00995 (HHK)

LAURA GONZALEZ-VERA, et al.,
Plaintiffs,
v.
MICHAEL VERNON TOWNLEY, et al.,
Defendants.

Decided February 18, 2009

MEMORANDUM OPINION

Plaintiffs Laura Gonzalez-Vera and Aaron Lloyd (together, "plaintiffs") bring this action against defendants Michael Vernon Townley, United States Attorney General Eric Holder ("AG"), and the United States of America ("Government") (together, "defendants"). Townley is a person under the protection of the federal Witness Security Program, 18 U.S.C. § 3521 *et seq.* (2006) ("WSP"), and plaintiffs seek to enforce a civil judgment against him. Accordingly, they name Townley as a defendant, but the *de facto* respondent pursuant to 18 U.S.C. § 3523(b) is the AG. Essentially, plaintiffs ask the court to appoint a guardian to enforce their judgment against Townley. Before the court are two dispositive motions: plaintiffs' "motion for summary judgment" [#9] and defendants' "motion to dismiss, or alternatively, for summary judgment" [#12].

Upon consideration of the motions, the oppositions thereto, and the record of this case, the court concludes that plaintiffs' motion must be DENIED and defendants' motion must be GRANTED.

I. BACKGROUND

Plaintiff Gonzalez-Vera is the widow of Carlos Soria, and plaintiff Lloyd is the personal representative of his estate. They hold a judgment against Townley for his role in Soria's murder. *See Gonzalez-Vera v. Kissinger*, 1:02-cv-02240, Order Granting Def. Judg. (November 23, 2005). Their efforts to enforce the judgment are governed by 18 U.S.C. § 3523, which provides:

> (a) If a person provided protection under this chapter is named as a defendant in a civil cause of action arising prior to or during the period in which the protection is provided . . . . The Attorney General shall make reasonable efforts to serve a copy of the process upon the person protected at the person's last known address. The Attorney General shall notify the plaintiff in the action whether such process has been served. If a judgment in such action is entered against that person the Attorney General shall determine whether the person has made reasonable efforts to comply with the judgment. The Attorney General shall take appropriate steps to urge the person to comply with the judgment. *If*

the Attorney General determines that the person *has not made reasonable efforts* to comply with the judgment, the Attorney General *may*, after considering the danger to the person and upon the request of the person holding the judgment *disclose the identity and location of the person* to the plaintiff entitled to recovery pursuant to the judgment.

***

(b)(1) Any person who holds a judgment entered by a Federal or State court in his or her favor against a person provided protection under this chapter may, upon a *decision* by the Attorney General *to deny disclosure* of the current identity and location of such protected person, bring an action against the protected person in the United States district court in the district where the person holding the judgment (hereinafter in this subsection referred to as the "petitioner") resides. . . .

***

[(b)](3) Upon a determination (A) that the petitioner holds a judgment entered by a Federal or State court and (B) that the Attorney General has *declined to disclose* to the petitioner the current identity and location of the protected person against whom the judgment was entered, the court shall appoint a

> guardian to act on behalf of the petitioner to enforce the judgment. . . . The Attorney General *shall disclose* to the guardian the current identity and location of the protected person and any other information necessary to enable the guardian to carry out his or her duties . . . .

18 U.S.C. § 3523 (emphasis added). The issue before the court is how to interpret these provisions.

There is no dispute that the AG has complied with his obligations under § 3523(a): the AG served Townley with process and notified plaintiffs that Townley had been served; and after plaintiffs secured a default judgment against Townley, the AG determined that Townley would make reasonable efforts to comply with that judgment by paying $75 per week until his retirement. Therefore, plaintiffs ask nothing more of the AG with respect to § 3523(a). Pursuant to § 3523(b), however, plaintiffs contend that the court must appoint a guardian to enforce their judgment and that the AG must disclose Townley's identity and location to that guardian to facilitate that enforcement. The AG counters that plaintiffs have no right to a guardian and that § 3523(b) imposes no obligation on him. The parties offer conflicting interpretations of § 3523(a)-(b) in support of their positions.

II. ANALYSIS

The instant motions present a straightforward question of statutory interpretation: whether plaintiffs are entitled to a court-appointed guardian under § 3523. "In resolving a question of statutory

interpretation, a court's starting point is always the language of the statute." *Saadeh v. Farouki*, 107 F.3d 52, 57 (D.C. Cir. 1997) (citing *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206, 214 (1984)). "If the language is plain on its face, courts do not ordinarily resort to legislative history." *Id.* (citing *Garcia v. United States*, 469 U.S. 70, 76 n.3 (1984)). Furthermore, "It is a generally accepted precept of interpretation that statutes or regulations are to be read as a whole, with each part or section . . . construed in connection with every other part or section." *American Federation of Government Employees, Local 2782 v. Federal Labor Relations Authority*, 803 F.2d 737, 740 (D.C. Cir. 1986) (internal quotation omitted). And "the cardinal principle of statutory construction [is] that courts must give effect, if possible, to every clause and word of a statute . . . ." *Williams v. Taylor*, 529 U.S. 362, 364 (2000).

Plaintiffs contend that the court must appoint a guardian pursuant to § 3523(b). In support of their contention, plaintiffs argue that the court must appoint a guardian if they can establish two preconditions: first, that they "hold[] a judgment entered by a Federal or State court"; and second, that the Attorney General has declined to disclose to the petitioner the current identity and location of the protected person against whom the judgment was entered. § 3523(b)(3)(A)-(B). According to plaintiffs, they have established both conditions: they hold a valid judgment against Townley, and the AG has declined to disclose Townley's identity and location to them. Accordingly, plaintiffs contend that the court must appoint a guardian under a plain reading

of § 3523(b)(3).

Defendants counter that plaintiffs have no right to a guardian under § 3523(b)(3). Defendants acknowledge that plaintiffs hold a judgment and thus have established the first precondition, but they contend that plaintiffs cannot establish the second precondition. According to defendants, the error in plaintiffs interpretation of § 3523 is that it completely ignores § 3523(a). Specifically, defendants point out that § 3523(a) only authorizes the AG to disclose Townley's identity and location to plaintiffs "if the [AG] determines that [Townley] has not made reasonable efforts to comply with the judgment." § 3523(a). Here, the AG has not made such a determination. Indeed, the AG determined that Townley will make reasonable efforts to comply with the judgment. Thus, the AG "has [not] declined to disclose" Townley's identify to plaintiffs because the statute never authorized him to do so in the first place. § 3523(b)(3). Accordingly, defendants contend that plaintiffs have not satisfied the second precondition, and they are not entitled to a court-appointed guardian.

The court agrees with defendants. The AG has not *declined* to reveal Townley's identity and location within the meaning of the statute because § 3523(a) does not authorize a disclosure unless the AG determines that Townley has not made reasonable efforts to comply with the judgment. Plaintiffs admitted as much before this litigation, and they requested nothing more from the AG. (*See Pls.' Mot. Summ. J., Ex. C, at 9* (They requested: "[i]f it is determined that Defendant Townley has not made reasonable efforts to comply with the

judgment, that the Attorney General disclose the identity and location of Defendant Townley to Plaintiff's counsel."); *id.* at 15 (same).) The AG determined that Townley will make reasonable efforts to comply with the judgment.[1] Under § 3523(a), once the AG has made that determination, the statute authorizes him to do nothing more. Therefore, plaintiffs have not satisfied § 3523(b)(3)(B), and they are not entitled to a guardian.[2]

What necessarily follows from this conclusion goes beyond plaintiffs having failed to satisfy § 3523(b)(3)(B). Indeed, the statute does not authorize petitioners to bring this case at all. Specifically, the statute authorizes plaintiffs to bring this action only "upon a *decision* by the Attorney General to deny disclosure of [Townley's] current

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[1] Plaintiffs suggest that the AG incorrectly determined that Townley will make reasonable efforts to comply with the judgment. Indeed, plaintiffs contend that Townley has more assets than the AG has located and thus is able to make a greater payment than the $75 per month payment, which the AG specified. These arguments, however, are not relevant to the question of statutory interpretation before the court.

[2] The relevant legislative history supports this conclusion. During the floor debate, Rep. Moorehead described the purpose of the statute as follows: "H.R. 4249 would codify the existing practice of the Department to disclose the new name and location of the protected witness if the person *refuses to honor* an outstanding judgment." 130 Cong. Rec. 13016 (1986) (emphasis added). Thus, according to Rep. Moorehead, the statute only contemplates disclosing the name and location of a protected witness, like Townley, if the AG first determines that Townley is not making reasonable efforts to comply with or "to honor" the judgment against him. *See id.*

identity and location . . . ." § 3523(b)(1) (emphasis added). Here, the AG did not make a "decision . . . to deny disclosure" because the AG was not authorized to disclose Townley's identity. *Id.* The statute grants the AG authority to disclose Townley's identity only upon finding that Townley was not making reasonable efforts to comply with the judgment. *See* § 3523(a). The AG made no such determination. Accordingly, he could not disclose Townley's identity. The AG had no choice, no discretion, no decision. *See id.* The "decision," which the AG may have had before him, lies in his discretionary authority to disclose or not disclose Townley's identity based on his assessment of the "danger" that Townley would face from disclosure. *See id.* The statutes does not authorize the AG to make this assessment nor this decision, however, unless he determines that Townley has not made reasonable efforts to comply with the judgment. Therefore, once the AG determined that Townley would make reasonable efforts to comply, no decision was before him. Accordingly, plaintiffs lack statutory authorization to bring this suit.[3] *See* §

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[3] The only federal case that has interpreted § 3523 supports this conclusion. *See Hermanson v. Hunter*, Civ. No. 07-00936, 2008 WL 2856470, *3-4 (N.D. Cal. July 23, 2008) (holding that the district court lacked subject matter jurisdiction because the plaintiff had no right to bring suit and because the United States had not waived its sovereign immunity; both conclusions were based on the finding that the plaintiff did not ask the AG to disclose the protected person's identity, and, therefore, the AG did not make a *decision* to deny disclosure). Unlike the court in *Hermanson*, the court here finds no issue with respect to sovereign immunity. The reason is that § 3523(b)(1) only authorizes a plaintiff to bring a suit "against the protected

3523(b)(1).

Accepting all allegations as true, the court holds that this action must be dismissed because plaintiffs can prove no set of facts in support of any of their claims that would entitle them to relief.[4] *See Gray v. Bell*, 712 F.2d 490, 493 n.2 (D.C. Cir. 1983); *see also* FED. R. CIV. P. 12(b).

III. CONCLUSION

For the foregoing reasons, it is this 18th day of February 2009, hereby

ORDERED that plaintiffs' motion for summary judgment [#9] is DENIED, and that defendants' motion to dismiss, or in the alternative, for summary judgment [##12, 16] is GRANTED. The court will enter a FINAL JUDGMENT in accordance with this Memorandum Opinion.

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person," not against the AG or the United States. The only burden that § 3523(b)(2) places on the AG is to "appear in the action" and "affirm or deny" certain allegations in the complaint. Accordingly, neither the AG nor the United States is a proper defendant in this case. Thus, were the court not dismissing the entire case, it certainly would dismiss the AG and the United States. That said, the court holds only that § 3523 did not authorize plaintiffs to bring this suit, and therefore, this action must be dismissed.

4 The court need not address defendants' argument that plaintiffs cannot bring this suit because they do not reside in this district nor need the court address the host of policy arguments raised by the parties.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 07-00995 (HHK)

LAURA GONZALEZ-VERA, et al.,
Plaintiffs,
v.
MICHAEL VERNON TOWNLEY, et al.,
Defendants.

Entered February 18, 2009

JUDGMENT

Pursuant to FED. R. CIV. P. 58 and for the reasons stated by the court in its Memorandum Opinion docketed this same day, it is this 18th day of February 2009, hereby

ORDERED and ADJUDGED that judgment is entered in favor of the defendants.

Henry H. Kennedy, Jr.
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5134
1:07-cv-00995-HHK

Laura Gonzalez-Vera and Ali Abed Beydoun,
as personal representative of the estate of
Carmelo Soria Espinoza, deceased,
Appellants
v.
Michael Vernon Townley, et al.,
Appellees

September Term 2009
Filed May 4, 2010

BEFORE: Henderson and Tatel, Circuit Judges,
and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for panel rehearing filed April 8, 2010, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Jennifer M. Clark, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5134
1:07-cv-00995-HHK

Laura Gonzalez-Vera and Ali Abed Beydoun,
as personal representative of the estate of
Carmelo Soria Espinoza, deceased,
Appellants
v.
Michael Vernon Townley, et al.,
Appellees

September Term 2009
Filed May 4, 2010

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Jennifer M. Clark, Deputy Clerk

18 U.S.C.A. § 3523. Civil judgments

(a) If a person provided protection under this chapter [18 USCS §§ 3521 et seq.] is named as a defendant in a civil cause of action arising prior to or during the period in which the protection is provided, process in the civil proceeding may be served upon that person or an agent designated by that person for that purpose. The Attorney General shall make reasonable efforts to serve a copy of the process upon the person protected at the person's last known address. The Attorney General shall notify the plaintiff in the action whether such process has been served. If a judgment in such action is entered against that person the Attorney General shall determine whether the person has made reasonable efforts to comply with the judgment. The Attorney General shall take appropriate steps to urge the person to comply with the judgment. If the Attorney General determines that the person has not made reasonable efforts to comply with the judgment, the Attorney General may, after considering the danger to the person and upon the request of the person holding the judgment disclose the identity and location of the person to the plaintiff entitled to recovery pursuant to the judgment. Any such disclosure of the identity and location of the person shall be made upon the express condition that further disclosure by the plaintiff of such identity or location may be made only if essential to the plaintiff's efforts to recover under the judgment, and only to such additional persons as is necessary to effect the recovery. Any such disclosure or nondisclosure by the Attorney General shall not

subject the United States and its officers or employees to any civil liability.

(b)(1) Any person who holds a judgment entered by a Federal or State court in his or her favor against a person provided protection under this chapter [18 USCS §§ 3521 et seq.] may, upon a decision by the Attorney General to deny disclosure of the current identity and location of such protected person, bring an action against the protected person in the United States district court in the district where the person holding the judgment (hereinafter in this subsection referred to as the "petitioner") resides. Such action shall be brought within one hundred and twenty days after the petitioner requested the Attorney General to disclose the identity and location of the protected person. The complaint in such action shall contain statements that the petitioner holds a valid judgment of a Federal or State court against a person provided protection under this chapter [18 USCS §§ 3521 et seq.] and that the petitioner sought to enforce the judgment by requesting the Attorney General to disclose the identity and location of the protected person.

(2) The petitioner in an action described in paragraph (1) shall notify the Attorney General of the action at the same time the action is brought. The Attorney General shall appear in the action and shall affirm or deny the statements in the complaint that the person against whom the judgment is allegedly held is provided protection under this chapter [18 USCS §§ 3521 et seq.] and that the petitioner requested the Attorney General to disclose

the identity and location of the protected person for the purpose of enforcing the judgment.

(3) Upon a determination (A) that the petitioner holds a judgment entered by a Federal or State court and (B) that the Attorney General has declined to disclose to the petitioner the current identity and location of the protected person against whom the judgment was entered, the court shall appoint a guardian to act on behalf of the petitioner to enforce the judgment. The clerk of the court shall forthwith furnish the guardian with a copy of the order of appointment. The Attorney General shall disclose to the guardian the current identity and location of the protected person and any other information necessary to enable the guardian to carry out his or her duties under this subsection.

(4) It is the duty of the guardian to proceed with all reasonable diligence and dispatch to enforce the rights of the petitioner under the judgment. The guardian shall, however, endeavor to carry out such enforcement duties in a manner that maximizes, to the extent practicable, the safety and security of the protected person. In no event shall the guardian disclose the new identity or location of the protected person without the permission of the Attorney General, except that such disclosure may be made to a Federal or State court in order to enforce the judgment. Any good faith disclosure made by the guardian in the performance of his or her duties under this subsection shall not create any civil liability against the United States or any of its officers or employees.

(5) Upon appointment, the guardian shall have the power to perform any act with respect to the judgment which the petitioner could perform, including the initiation of judicial enforcement actions in any Federal or State court or the assignment of such enforcement actions to a third party under applicable Federal or State law. The Federal Rules of Civil Procedure shall apply in any action brought under this subsection to enforce a Federal or State court judgment.

(6) The costs of any action brought under this subsection with respect to a judgment, including any enforcement action described in paragraph (5), and the compensation to be allowed to a guardian appointed in any such action shall be fixed by the court and shall be apportioned among the parties as follows: the petitioner shall be assessed in the amount the petitioner would have paid to collect on the judgment in an action not arising under the provisions of this subsection; the protected person shall be assessed the costs which are normally charged to debtors in similar actions and any other costs which are incurred as a result of an action brought under this subsection. In the event that the costs and compensation to the guardian are not met by the petitioner or by the protected person, the court may, in its discretion, enter judgment against the United States for costs and fees reasonably incurred as a result of the action brought under this subsection.

(7) No officer or employee of the Department of Justice shall in any way impede the efforts of a guardian appointed under this subsection to enforce the judgment with respect to which the guardian was appointed.

(c) The provisions of this section shall not apply to a court order to which section 3524 of this title applies.

(Added Oct. 12, 1984, P. L. 98-473 Title II, Ch XII, Part F, Subpart A, § 1208, 98 Stat. 2153.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 85-0761

ISABEL MOREL DE LETELIER, et al.,
Plaintiffs,
v.
MICHAEL VERNON TOWNLEY,
Defendant.

Filed March 16, 1987

MEMORANDUM AND ORDER

The defendant is a protected person in the Federal Witness Protection Program. On November 5, 1980 the petitioners obtained a civil judgment in this court of $5,062,854.90 against the defendant. See *Letelier v. Republic of Chile*, 502 F. Supp. 259 (D.D.C. 1980). Petitioners have appropriately moved to collect this judgment through the procedures outlined in 18 U.S.C.A. § 3523 (West 1985), a statute which provides for the enforcement of civil judgments against protected persons without compromising their security.

Under 18 U.S.C.A. § 3523(b)(1), the petitioners, who reside in the District of Columbia, brought an action in this court for the enforcement of their valid judgment. Because the Attorney General declined to disclose to the petitioners the current identity and location of the protected person, the

court appointed M. Michael Cramer as guardian to enforce the judgment on the petitioners' behalf. 18 U.S.C.A. § 3523(b)(3). The statute provides that the guardian "shall have the power to perform any act with respect to the judgment which the petitioner could perform," 18 U.S.C.A. § 3523(b)(5), and in accordance with this provision the guardian deposed the defendant to determine his assets. Mr. Cramer has filed his report and an application for costs and fees based on his services. The issue before the court now is who should pay the guardian's costs and fees.

Subsection (b)(6) of the statute provides that such costs incurred due to a subsection (b)(5) enforcement action and the guardian's fees should be apportioned among the parties. The statute provides, first, that the petitioner be assessed the amount he "would have paid to collect on a judgment in an action not arising under the provision of this subsection." In this case, the costs petitioners would have incurred would have been assessed to the defendant, since petitioner was the prevailing party. Fed. R. Civ. P. 54(d). In addition, counsel for the petitioners are working *pro bono*, hence no attorneys' fees would have accrued. As a result, the petitioners will not be assessed costs or fees.

Second, the statute provides that the protected person be assessed "the costs which are normally charged to debtors in similar actions and any other costs which are incurred as a result of an action brought under this subsection." 18 U.S.C.A. § 3523(b)(6). However, the subsection continues,

> In the event that costs and compensation to the guardian are not met by the petitioners or by the

> protected person, the court may, in its discretion, enter judgment against the United States for costs and fees reasonably incurred as a result of the action brought under this subsection.

Under the statute, therefore, the defendant must initially be assessed the guardian's remaining costs and fees. In this case, however, there is an outstanding judgment against the protected person of more than five million dollars. Because the judgment already rendered against the defendant far exceeds the assets to which he testified in his deposition, this court finds that the protected person cannot pay the guardian's costs and fees. Thus, the remaining costs and fees will be assessed to the United States. Such an assessment ensured that the defendant's assets are reserved for those found deserving in the civil action. This decision also promotes the purpose of the statute which was to allow successful litigants to collect civil judgments rendered against protected persons. In addition, this is a proper cost of the Federal Witness Protection Program which must be borne by the federal government. The program is of such significance that the government assumes the high costs of providing witnesses with new identities, living stipends, and new jobs in new communities. The cost of collecting civil judgments in a manner that tries to ensure the safety of the protected person and the security of their new identity is another cost the government must bear, where, as here, the protected person does not have the assets to pay both the valid civil judgment and the costs of collecting that

judgment. In these circumstances the government should pay the guardian.

Therefore, upon consideration of the report of the guardian, M. Michael Cramer, and it appearing that said guardian has discharged the duties for which he was appointed by this court and that his requested costs and fees were reasonably incurred as a result of his appointment, it is this 16th day of March 1987

ORDERED that the report of the guardian be, and the same is hereby accepted; and it is further

ORDERED that the guardian be discharged from further service in this case; and it is further

ORDERED that the guardian shall be paid costs and fees in the amount of $2,093.34. These costs and fees shall be paid by the United States.

/s/
William B. Bryant
Senior United States District Judge

March 16, 1987